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In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-1792

BOARD OF TRUSTEES OF
KEENE STATE COLLEGE, ET AL.,
PETITIONERS,

v.

CHRISTINE M. SWEENEY,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

REPLY BRIEF FOR PETITIONERS

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I. INTRODUCTION

The respondent's Brief in Opposition urges this Court to conclude that the questions presented by the Petition for Certiorari are purely objections to findings of fact. The respondent thereby invites a repetition of the judicial error

below, namely, accepting her circumstantial evidence as valid conclusive proof of sex discrimination in an individual academic promotion case.

The treatment of proof below constituted *legal error.* Petitioners take issue with

(1) the competency of respondent's evidence to support the ultimate finding of sex discrimination, and
(2) the burden of proof under which they labored as defendants—which was to "prove absence of discriminatory motive" (A-15).

"Given the meandering course that Title VII adjudication has taken",[1] it is not surprising to find lower courts proceeding on erroneous theories based on pre-existing understandings about appropriate standards of proof.

The Brief in Opposition is composed largely of material transposed from the Court of Appeals' opinion and sets forth again the respondent's evidence. Therefore, petitioners are compelled now to address more specifically the competency and relevancy of the evidence, as well as to correct certain overstatements and errors of fact in respondent's brief.

II. Inferential Proof in a Disparate Treatment Case—Whether the Plaintiff's Evidence Can Sustain the Trial Court's Ultimate Finding of Discrimination

The Court of Appeals has stated that

> "... an individual plaintiff who alleges disparate treatment because of her sex must prove that her unfavorable treatment was *sexually premised.*" (A-14) (emphasis supplied)

The court further states that

> "... a plaintiff may rely upon inferential proof of discriminatory motive in a disparate treatment case." (A-16)

Clearly, however, an inference is only as valid as the evidence from which it is derived. Here the courts below erroneously accepted the plaintiff's evidence as valid, i.e., both relevant and meaningful to her individual case. This evidence consisted of

(1) "specific examples of sex discrimination involving the plaintiff and other females" (Brief in Opp. pp. 2, 7);
(2) statistical evidence (Brief in Opp., pp. 2, 6-7); and
(3) opinion testimony that societal bias influenced promotion decisions (Brief in Opp., p. 8).

When examined separately, each leg of the plaintiff's case is incomplete, or logically unrelated to an inference of *sex* discrimination in *her promotion*, and incapable of supporting the conclusive finding of a Title VII violation. Their sum is no stronger.

A. *Plaintiff's Specific Examples*

The specific examples involving the plaintiff herself include the "English Trip", which figures significantly in the opinions of both courts below (B-4-6, B-8-9, B-12-13; A-4-6); and the response of the college's affirmative action coordinator to the plaintiff's filing of charges with the

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[1] Opinion concurring in the result, and concurring in part, filed by Mr. Justice Powell in *Nashville Gas Co.* v. *Satty*, ___ U.S. ___, 54 L.Ed.2d 356, 363, 98 S.Ct. ___ (1977).

State's human rights commission, which the Court of Appeals deemed the "most striking evidence presented in this context" (i.e., specific instances). (A-19)

With respect to the "English Trip", both courts below specifically stated that the dean's (Dean Davis) decision was *not* an example of sex discrimination. (B-13, 24; A-4-5) Moreover, the trial court stated:

> "It is true that Dean Davis turned the plaintiff down twice for promotion, but on both occasions he was acting in accord with the unanimous recommendation of FEAC. He had previously approved the unanimous recommendation of FEAC that she be granted tenure. Whatever personal animus Dean Davis may have had against the plaintiff, there is *no evidence that it was sex biased.*" (B-13) (emphasis supplied)

The Court of Appeals mentions the "English Trip" because, it says, "the incident plays a role in later developments." (A-5) Indeed, the plaintiff kept the incident alive because she believed she had been discriminated against and that the trip veto "was the prime reason for her failure to get promoted." (B-5-6, 7-9) In 1975, some four years later, the plaintiff raised the "English Trip" in the appeal of her promotion failure during the 1974-75 academic year. This was the year the trial court concluded the plaintiff should have been promoted. (B-25) The chairperson of the investigating faculty committee, Dr. Janet Grayson, reported on plaintiff's complaints in her letter to the president, and concluded:

> "*Although we did not find evidence to support her charge of discrimination because of sex,* we are concerned that she had to endure unprofessional treatment within her department and by the administration." (B-12) (emphasis supplied)

Any effect the "English Trip" may have had on her promotion attempts cannot be attributed to sex discrimination if the incident did not arise from sex discrimination initially. The investigating faculty committee did not think the dean's actions were sexually premised—either the trip veto or the promotion decisions. The trial court did not think so either. (B-13) Therefore, the court's inference of discrimination in promotion in 1974-75 cannot logically rest on the "English Trip", or the dean's concurrence with the faculty evaluation committee's negative recommendation.

The other specific example involving the plaintiff concerned the college's director of administration, who had also been designated as the campus affirmative action coordinator.[2] (Brief in Opp., p. 7; A-19) But, any inference drawn from this administrator's actions is totally irrelevant to a conclusion of sex discrimination in faculty promotion since he played no part in the promotion process. He was not a member of the faculty. No evidence indicated that he served in a policy making role of any kind nor in any way influenced faculty promotion decisions. The courts below erred in making this evidence inferential support for plaintiff's allegation of sex discrimination in her promotion.

B. *Affirmative Action Efforts*

Both the trial court and the Court of Appeals erroneously inferred proof of sex discrimination against the plaintiff from criticism of the college's affirmative action plan. Respondent's brief quotes the Court of Appeals' opinion and points up this error:

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[2] The college is part of a state university system. The same Board of Trustees governs all the divisions of the system (A-2, n.1) and, as a matter of policy, is committed to affirmative action. A system-wide affirmative action plan was adopted for all divisions, including Keene, in 1976. (B-16)

"An important part of her case centered around the ineffectiveness of Keene's affirmative action effort. . . . The current plan, in the form presented to the district court, does not even address the questions of salary and promotion." (Brief in Opp., p. 7, quoting court's opinion, at A-19)

The trial court also relied heavily on this evidence to infer sex discrimination against the plaintiff. It specifically found:

"3. Those in charge of the affirmative action program have failed to act affirmatively on behalf of women with regard to hiring, promotion and salary." (B-25)

"11. The affirmative action plan is inadequate, particularly in regard to promotion and salary." (B-25)

In the body of its opinion, the trial court comments on the testimony of Dean Davis and President Redfern (two of the named defendants) and reveals how it (improperly) inferred from such generalized observations proof of sex discrimination against the plaintiff:

"The only evidence of sex bias on the part of Davis is his passive role in Keene's affirmative action program. . . . [H]e made *no special effort* to see to it that women took part in the promotion process." (B-13) (emphasis supplied)

and

"As President of the College, Redfern has the duty to see to it that the affirmative action plan is implemented. . . . There is no evidence that Redfern made any *specific efforts* to upgrade or advance the status of women on campus in any way." (B-14) (emphasis supplied)

Further references by the trial court at pages B-16 through 18 and B-21 indicate the extent to which the lower court believed this evidence constituted proof of pervasive sex discrimination.

However, as a matter of law, no requirement exists for an affirmative action plan under Title VII, the basis for the courts' jurisdiction. (B-2) *Long* v. *Ford Motor Company*, 496 F.2d 500, 505 (6th Cir. 1974); *Walthall* v. *Blue Shield of California*, — F. Supp. —, 12 FEP Cases 933, 936 (N.D. Ca. 1976).

No evidence was introduced that Keene State College was even required to have an affirmative action plan, nor did the plaintiff allege violations of Executive Order No. 11246 which imposes affirmative action obligations on government contractors. (41 CFR §60-2.1 *et seq.*, Revised Order No. 4) Moreover, even if the college were required to have had an affirmative action plan, it was inappropriate for the courts to evaluate the plan before it was reviewed by the agency with that responsibility.[3] (41 CFR §60-2.2) Pertinent federal regulations (41 CFR §60-2.10 - 2.14) contain no references to promotion and salary as required considerations in affirmative action plans, yet the courts below erroneously concluded that the plan was inadequate in these respects. (Specific Finding #11, B-25; A-19) Ironically, the courts below viewed the college's voluntary affirmative action efforts as evidence of intent to discriminate. This constitutes legal error.

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[3] *Cf.*, *Cannon* v. *University of Chicago*, on doctrine of primary jurisdiction and exhaustion of administrative agency process, 406 F.Supp. 1257, at 1260 (D.C. Ill. 1976); *aff'd* 559 F.2d 1063 (7th Cir. 1976), *aff'd on rehearing*, 559 F.2d 1077 (1977), *cert. granted on other grounds*, 46 U.S.L.W. 3803 (12/28/77).

C. Statistical Evidence

Respondent contends that she presented "overwhelming statistical evidence demonstrating that women, in general, are and have been discriminated against . . .". (Brief in Opp., p. 2) Respondent asserts "the statistical data . . . was uncontroverted by the defendants." (Brief in Opp., p. 10) The data, however, were never the subject of controversy; the numbers were furnished from the college's records. Rather, the twofold controversy continues to be

(1) the probative force to which the statistical evidence is entitled *in the context of this case*; and
(2) whether defendants are obligated to "totally dispel the inference of discrimination created by the . . . [plaintiff's] statistics." (A-18) (See discussion, *infra,* of defendant's burden.)

Respondent quotes the Court of Appeals citing *International Brotherhood of Teamsters* v. *United States,* 431 U.S. 324 (1977) concerning the competency of statistical proof (Brief in Opp., p. 5) but omits this Court's caution that

> ". . . statistics are not irrefutable. . . . In short, *their usefulness depends on all of the surrounding facts and circumstances.* See, *e.g., Hester* v. *Southern R. Co.,* 497 F.2d 1374, 1379-1381 [(5th Cir. 1974)]," 431 U.S., at 340 (emphasis supplied)

In *Hester,* the Fifth Circuit held that general population figures could not be used to determine the availability of typists capable of typing 60 words per minute.

Similarly, numbers of men and women serving in, and promoted to, various academic ranks is meaningless without comparison to some applicable labor pool. Respondent's brief stated that

> "[d]efendants erroneously contend that . . . the trial court ignored the number of women in the applicable labor pool" (Brief in Opp., p. 10)

and

> "the trial court *did* consider the relevant labor market in its statistical analysis". (Brief in Opp., p. 13)

This is not supported by the record. The District Court's analysis (B-22-23) fails even to mention the concept of relevant labor market or applicable labor pool and deals solely with "a very marked disparity between the number of males and females . . .". (B-23). The respondent says that her "evidence provided an appropriate basis for the trial court's finding" (Brief in Opp., p. 10) and then proceeds in the following paragraphs, at pages 10-13, to invite erroneous conclusions from this Court by presenting raw numbers, irrelevant salary data concerning herself, data without context, and misleading and mistaken statements of fact, including but not limited to:

(1) Table of absolute numbers which obscures the relevant labor market in each of the various academic disciplines.
(2) Table of average salaries which obscures factors of merit and longevity, and whose averages are drawn in many instances from populations as small as 1 to 5.
(3) Statement that men were often hired as full professors without having previously served in that rank whereas women with equal qualifications were forced to serve as associate professors and wait for promotions. The plaintiff presented the case of *only one* woman about whom this inference could possibly be drawn. The brief fails to

mention the favorable treatment of the *plaintiff who herself was hired as an associate professor without ever having served in that rank.*

(4) Table of appointments and promotions which omits applicant/candidate data; *e.g.*, in 1974, 3 women applied for promotion to associate professor and all were successful; no women were promoted to full professor, but none were candidates.

(5) Statement that defendants fail to point out that of the five of six women promoted in 1975, none was promoted to full professor. This statement simply is not true because in that year Dr. Janet Grayson was promoted to full professor.

This Court has already considered the competency of statistical evidence in *Teamsters, supra, Hazelwood* v. *United States,* 433 U.S. 299 (1977), and *Mayor of Philadelphia* v. *Educational Equality League,* 415 U.S. 605, 620-621 (1974), among others. Similarly, it is appropriate for petitioners to seek this Court's consideration of statistics in this employment setting.

D. *Societal Bias*

In the final analysis, after the specific examples and statistical evidence are examined discerningly, what remains are vague generalizations about societal bias. The courts below weighed this factor heavily but failed to note the absence of its manifestation in the faculty committees making promotion and tenure recommendations. Respondent's brief quotes, at page 8, the Court of Appeals' statement:

> "This bias may often be unconscious and unexpressed, but its potential for harm is greatest in reaching decisions on the basis of criteria which simply cannot be objectively measured or definitely stated." (A-20)

The significance the trial court attributed to societal bias is shown by statements throughout its opinion. Summarizing the testimony of "one of the key witnesses for the plaintiff", the lower court said:

> "In her opinion, there is no awareness by men that they discriminate against women." (B-15)

and

> ". . . Professor Vander Hagen admitted, in effect, that Keene reflects the traditional societal bias against women. She feels that women are disadvantaged as a group because of social categories. . . . Professor Vander Hagen did state that some men could be educated to understand the problems of women." (B-16)

The trial court said about the testimony of the woman who was the plaintiff's expert witness:

> "She pointed out that the decision making process at Keene was all male and that this resulted in men being favored in the majority of cases." (B-21)

And, in its salary analysis, the court concluded that:

> "Since under the present system . . . , the ultimate decision on salary is largely determined by males, *there is bound to be discrimination against females,* especially if we give credence to the belief of Professors Vander Hagen and Lyman that most males have a built-in societal bias against females." (B-24) (emphasis supplied)

These judicial observations fail to distinguish, however, between attitude and action. Title VII does not proscribe

societal bias. Title VII addresses itself to practices. The courts below lost sight of the individual plaintiff's obligation to show a nexus—i.e., to show that male societal bias, in fact, impeded her career. The courts' generalized presumption that male decision makers are bound to discriminate against women was not borne out by the facts in plaintiff's own case.

To the contrary, defendants presented evidence that the plaintiff was treated as well as, and in some cases, *more* favorably than others, including men, at the college.

The following sample illustrates:

(1) Plaintiff was hired at a higher rank than she had ever filled. She had been an assistant professor at Emmanuel College for only two years before coming to Keene. Though she had been promoted to associate professor at Emmanuel, she never served in that rank. Keene's requirement for time in grade as assistant professor was four years, and men as well as women were routinely turned down for promotion to associate professor because of failure to satisfy this requirement.

(2) Plaintiff was given tenure, or permanent status, at the earliest possible date. Tenure is the single most important decision made about any professor at an American college.

(3) In her rate of progress from assistant to associate to full professor, the plaintiff fared better than most men at Keene. Because of the college's time in grade requirements, the *minimum* time from assistant to full professor was 8 years. The plaintiff attained full professor rank in 9½ years of service. Though some served fewer years as associate professor (and some served longer), only the very exceptional bettered her overall rate. No one testified that the plaintiff was outstanding.

The faculty committee in 1974-75 gave plaintiff a negative recommendation for legitimate reasons. No evidence —other than that the committee members were all male— was introduced to support an inference that this committee's action was sexually premised. The underlying assumptions about male attitudes and behavior accepted by the courts below placed the defendants in the position of having to prove that societal bias did not exist at the college. This was legal error.

III. Rebuttal in an Individual Disparate Treatment Case —Whether Defendants Were Obligated To Prove Absence of Motive and To Totally Dispel the Inference Created by Circumstantial Evidence

The trial court, in Finding #8 (B-25), apparently imposed on defendants the burden of proving a nondiscriminatory motive. Respondent's brief concedes that this is not the defendants' burden, and argues that the Court of Appeals stated the correct rule, namely, that defendants must totally dispel the inference created by plaintiff's statistics. (Brief in Opp., pp. 13-14) In fact, the Court of Appeals compounded the trial court's error. The Court of Appeals stated that

> ". . . in requiring the defendant *to prove absence of discriminatory motive,* the Supreme Court placed the burden squarely on the party with the greater access to such evidence." (A-15) (emphasis added)

Further the court said:

> "The defendant attempted to rebut these statistics by pointing to highly qualified men who remained in the lower ranks longer than Dr. Sweeney. While this evidence is informative, the district court was not

> required to find that it *totally dispelled the inference of discrimination created by the other statistics.*" (A-18) (emphasis supplied)

Instead of recognizing that plaintiff's promotion to full professor as rapidly as highly qualified men at Keene dispelled the basis for the ultimate finding of fact (that plaintiff was discriminated against because of her sex), the Court of Appeals affirmed the trial court's reliance on inference based on generalities, and required the defendants to "totally dispel" the inference of discrimination.

But, this Court's rule in *McDonnell Douglas Corp.* v. *Green,* 411 U.S. 792, 802 (1973), "to articulate some legitimate, non-discriminatory reason", does not require defendants to totally dispel inferences about class discrimination drawn from plaintiff's indirect evidence. The courts below applied erroneous standards to defendants' evidence.

Respondent's brief asserts that burden of proof issues in discrimination cases are well settled, citing the case of *Furnco Construction Corp.* v. *Waters,* recently decided by this Court, — U.S. —, 46 U.S.L.W. 4966 (June 29, 1978). (Brief in Opp., pp. 8-9) Instead of supporting respondent's assertion, the *Furnco* case illustrates exactly the type of legal error committed by the courts below in the instant case.

In *Furnco,* this Court reversed and remanded because the Court of Appeals confused proof of a *prima facie* showing with an ultimate finding of discrimination:

> "We think the Court of Appeals went awry, however, in apparently equating a prima facie showing . . . with an ultimate finding of fact . . . . . The Court of Appeals, as we read its opinion, thought Furnco's hiring procedures . . . must be the method which allows the employer to consider the qualifications of the largest number of minority applicants." 46 U.S.L.W., at 4969.[4]

[4] See discussion of affirmative action efforts, *supra.*

So in the present case, the courts below have gone awry by requiring the defendants to dispel plaintiff's prima facie case by meeting it on its own terms, i.e., by introducing more impressive statistics to refute generalized inferences. But, this is not a "pattern or practice" case, or a class action. So long as defendants' evidence indicates the plaintiff herself was not discriminated against by reason of her sex, a generalized inference of discrimination against women cannot establish the ultimate finding required in an individual disparate treatment case. Or, in the language of *Furnco,* the prima facie case which raises the inference of class discrimination does not equate to the ultimate finding of discrimination against the individual.

IV. Conclusion

Respondent's brief asserts that petitioners believe "the decision making processes of educational institutions are *a priori* exempt from judicial scrutiny." (Brief in Opp., p. 9) This distorts petitioners' position. This Court has already applied Title VII to varying factual situations and employment settings. Petitioners seek clarification for the academic employer whose decision making processes, such as reliance on faculty peer evaluation, are different from those policies and practices followed in business and industry.

This case does present important legal questions concerning judicial assumptions and treatment of proof. The Petition for Certiorari should be granted.

Respectfully submitted,

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